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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
Order below	41a
Jurisdiction	2
Question Presented	2
Statutes involved	2
Statement	2, 3, 4, 5
Reasons for granting the writ	5, 6, 7, 8, 9
Conclusion	9
Appendix A	1a-42a
Appendix B	42a-46a

CITATIONS

CASES:

Camero v. United States, 345 F.2d 798	8
Federal Communications Commission v. WJR, the Goodwill Station 337 U.S. 265	8
Goett v. Union Carbide Corp., 361 U.S. 357	9
Patterson v. Hewitt, 195 U.S. 309	6
Seminole Nation v. United States, 316 U.S. 1049	8, 9
Speidel v. Henrici, 120 U.S. 377	6, 7

STATUTES AND JOINT RESOLUTION:

Act of July 2, 1864, 13 Stat. 489	3, App. 42a
Joint Resolution of Congress, April 10, 1869, 15 Stat. 348	3, App. 17a, 43a
Act of May 7, 1878, 20 Stat. 56	App. 44a, 45a
Act of March 3, 1887, 24 Stat. 488	App. 45a, 46a

RULES:

Rule 64(d) of the Court of Claims	8

MISCELLANEOUS:

Lost Bond Case, page 206, Volume 5, 1884, First Comptroller of the Currency Decisions	6, App. 41a, 42a

IN THE

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OCTOBER TERM, 1965

No. 401-64

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Howard T. Foulkes, Administrator De Bonis Non Cum Testamento Annexo in the Will of Charles Durkee, deceased, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

ORDER BELOW

The Court of Claims did not render an opinion but did enter an order October 29, 1965 dismissing the petition without oral argument concluding that the claim was barred by the statute of limitations, 28 U.S.C. § 2501 and by the doctrine of laches.

JURISDICTION

The order of the Court of Claims was entered October 29, 1965 (App. 41a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Did the Court of Claims act in an arbitrary manner and in violation of Fifth Amendment Due Process in granting the Government's Motion for Summary Judgment dismissing, because of laches and limitations, Plaintiff's claim that the United States Treasury was holding as trustee funds received by it from the retirement of First Mortgage Bonds of the Pacific railroads, such dismissal being without oral argument and articulation of the reasons therefor and when genuine issues of material facts existed as to whether or not a trust had been created and repudiated by the trustee thereof.

STATUTES AND JOINT RESOLUTION INVOLVED

Act of July 2, 1864, 13 Stat. 489. App. 42a

Joint Resolution of the Congress, April 10, 1869, 15 Stat. 348. App. 43a

Act of May 7, 1878, 20 Stat. 56. App. 44a, 45a

Act of March 3, 1887, 24 Stat. 488. App. 45a, 46a

Rule 64(d) of the Court of Claims. App. 8

Pertinent portions of the above Joint Resolution and Statutes are set forth in Appendix B, infra, pp. 42a to 46a.

STATEMENT

Petitioner, Howard T. Foulkes, is the Administrator De Bonis Non Cum Testamento Annexo of the Wills of Charles Durkee and his wife, Caroline Durkee, both deceased. (App. 1a)

In order to finance their construction the Pacific railroads were authorized by the Act of July 1, 1862, 12

Stat. 489, and by the Act of July 2, 1864, 13 Stat. 356, to issue their 6% First Mortgage Bonds, sometimes called Paramount Lien Bonds (herein called Bonds). (App. 2a, 42a, 43a) Charles Durkee was a partner in John W. Kerr and Company, Salt Lake City, Utah, a firm which supplied materials for the construction of the railroads. (App. 16a)

Prior to the completion of the railroads President Andrew Johnson, without any apparent authority of law, ordered the railroads to deposit these Bonds with the Government as security for completion of the railroads. (App. 20a)

Pursuant to Joint Resolution of the Congress of April 10, 1869 the President appointed a commission to report whether the railroads had been completed satisfactorily. (App. 17a, 43a) Debates on this Resolution confirm that the President had called in these bonds. The Commission reported that the railroads were completed satisfactorily. After this report Charles Durkee proceeded to Washington, D. C. to claim the Bonds. His death enroute in Omaha, Nebraska in 1870 intervened. His personal records were transferred to the Metropolitan National Bank of New York City. Among these records were assignments to him of the Bonds, (App. 17a) which assignments cannot yet be found.

On April 22, 1884, in Washington, D. C., Leonard Blaisdell, attorney and husband of a niece of Charles Durkee, met with officials of the United States, including the Secretary of the Treasury and the Secretary of State, Frederick T. Frelinghuysen. At this meeting the Secretary of the Treasury acknowledged that Charles Durkee was the sole assignee of the Bonds. (App. 17a, 24a, 25a, 30a) The Secretary of State, Mr.

Frelinghuysen, executed a written statement dated January 19, 1885, impressed with the Seal of the United States, acknowledging the matters discussed in that meeting. (App. 35a, 36a)

The Government also acknowledged that it was holding these Bonds for the righful owners as is evidenced in the Lost Bond Case, Page 206, Volume 5, 1884, First Comptroller of the Currency Decisions. (App. 41a, 42a)

The Government's Motion for Summary Judgment refers to *Kuykendall* v. *Gage,* Equity No. 22,296, filed in the Supreme Court for the District of Columbia, and *Kuykendall* v. *Union Pacific,* filed in the Federal District Court in Utah, and to the opinion thereon by the Circuit Court in 163 F.2d 819 (1908). (App. 5a, 6a, 17a, 18a) The Government was not a party to either of these actions and neither was the Estate of Charles Durkee. Kuykendall petition to be appointed Administrator of the Durkee Estate in Wisconsin was denied. He then succeeded in being appointed in Utah which did not have jurisdiction because Charles Durkee at his death was domiciled in Wisconsin. Leonard Blaisdell filed a suit in 1894 in the Court of Claims, No. 18003. This was dismissed without prejudice on demurrer because he represented the heirs at law and not the estate. (App. 17a) Thus there has never been a legal representative of the estate of Charles Durkee until the claim was filed below by Petitioner.

The press release, upon which the Government concludes that the trust had been repudiated, states (App. 13a, 14a):

> "No bonds whatever have been deposited with any branch of the government by any of the Pa-

> cific railroads, except those deposited in pursuance of the Joint Resolution of Congress, April 10, 1869 (16 Stat. 56) which authorized the President to require from the companies security for the completion of the roads. The bonds so deposited, amounting to five million six hundred thousand dollars, were returned to the companies on the completion of the roads".

The bonds referred to in this press release are coupon bonds and are not the Bonds involved in this action as disclosed by the Finance Report, Vol. 28, page 237, and Vol. 29, page 193, referred to in the press release but not attached to it. The Bonds here are the ones Senator John Sherman of Ohio referred to in his speech on the floor of the Senate on April 9, 1869 (41st Congress, First Session, page 674 of the Congressional Globe) when he said (App. 19a, 20a)

> "For instance, the Union Pacific Railroad Company have already deposited, perhaps without any authority of law, three million dollars of their first mortgage bonds with the United States to secure the partial completion of their road".

Petitioner believes Respondent has documents which will assist in proving this claim, such as the Agreement between the railroads and the Government. This document and others have not been made available to Petitioner and the assistance of the Court of Claims will be required to obtain them. (App. 25a)

REASONS FOR GRANTING THE WRIT

The Court of Claims granted the Government's Motion for Summary Judgment even though the Opposition thereto showed convincingly that genuine issues of material fact existed. Plaintiff claimed that the

Government was holding trust funds composed of receipts from the retirement of the Bonds of the Pacific railroads. (App. 2a, 3a, 5a, 24a, 25a) The Government in its Motion denied that a trust existed but asserted if one did exist the trust had been repudiated. (6a) Genuine issues of material facts thus existed precluding summary judgment.

The Motion for Summary Judgment was granted without oral argument and without articulating the reasons why the statute of limitations and the doctrine of laches barred the claim. Fifth Amendment Due Process was thus denied.

The dismissal order permits the Government to escape its duties as a trustee and to expropriate funds of its citizens without any legal authority and without being required to admit or deny on the merits the validity of the claim.

It is respectfully asserted that this is an appropriate case for this Court to exercise supervisory powers over an inferior court.

1. The order of the lower court dismissing the claim was arbitrary and in violation of Fifth Amendment Due Process because genuine issues of material fact existed precluding Summary Judgment, there was no opportunity for oral argument and no articulation of the reasons why limitations and laches controlled.

(a) Laches and limitations do not bar a trust like this absent a repudiation of the trust which has been brought home unequivocally to the beneficiary. *Speidel* v. *Henrici* (1887) 120 U.S. 377, which was followed in *Patterson* v. *Hewitt* (1904) 195 U.S. 309. In *Speidel* this Court said, 120 U.S. p. 386:

> "As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust . . . . But this rule is in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to qualifications: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; * * * ".

A trust was created and a public acknowledgment made by the Government that it was holding these bonds for the rightful owners in the Lost Bond Case, page 206, Volume 5, 1884, First Comptroller of the Currency Decisions, which states (App. 41a, 42a):

> "The usage as to the bonds now in question, and as to all bonds presented for payment, or for the issue of a duplicate as to which there is a question of controverted ownership is to stamp them thus: 'Treasury Department, Office of the Secretary, April 22, 1884. Held for decision of ownership' and a proper record is to be made to protect the rights of claimants".

April 22, 1884, is the date that Leonard Blaisdell, attorney, had an official meeting with the Secretary of the Treasury and other Treasury Department officials together with the Secretary of State concerning the claim of Charles Durkee as the sole assigne of the Bonds here involved. (App. 17a, 24a, 25a, 30a)

The press release, as a purported repudiation of this trust, was not concerned with the bonds here involved and there is no evidence that the release was unequivo-

cally made known to the Durkee estates. Though not attached to this press release the financial report referred to therein describes the bonds which were deposited with the Government pursuant to the Joint Resolution of Congress referred to above. (App. 20a)

(b) Since there was a genuine dispute as to whether a trust was created and repudiated, genuine issues of material fact therefore existed precluding the granting of summary judgment. Rules and decisions of the Court of Claims so provide. *Camero* v. *United States* (Ct. Cl. 1965) 345 F.2d 798. Rule No. 64(d) of that court pertinently provides:

> "The judgment [Summary Judgment] shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(c) Fifth Amendment Due Process was denied when the lower court dismissed the claim without an opportunity of oral argument, without articulating the reasons why it "concluded" that limitations and laches barred the claim and while genuine issues of material fact existed.

Oral argument is not always required even for substantial questions but petitioner believes that procedural due process required an opportunity for oral argument under the circumstances of this case prior to any determination that limitations and laches barred the claim. *Federal Communications Commission* v. *WJR, the Goodwill Station,* 337 U.S. 265.

Whether a trust was created and repudiated were material issues and findings should have been made.

In *Seminole Nation* v. *United States,* 316 U.S. 1049, 1056, this Court commented upon the duty to make findings on material issues as fellows:

> "We do not say that all this establishes liability on the part of the Government for it is not our function, in reviewing judgments of the Court of Claims, to make basic findings of fact. When the Court of Claims fails to make findings on a material issue, it is proper to remand the case for such findings".

See also *Goett* v. *Union Carbide Corp.,* 361 U.S. 357, reversing a judgment for failure of the lower court to "articulate" the basis of its decision.

CONCLUSION

For the foregoing reasons Petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:

WOODROW E. FAULKNER
Washington, D. C.

January 1966

APPENDIX A

ORIGINAL

IN THE UNITED STATES COURT OF CLAIMS

No.

HOWARD T. FOULKES, ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO IN THE WILL OF CHARLES DURKEE, DECEASED, *Plaintiff*

v.

THE UNITED STATES.

Petition

To the Honorable, the United States Court of Claims:

Plaintiff, Howard T. Foulkes, as Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, and also as Secretary-Treasurer of the Board of Trustees of Racine College, Racine, Wisconsin, residuary beneficiary herein, respectfully represents:

1. Plaintiff is a citizen of the United States, a resident of Milwaukee, Wisconsin, and is presently the duly appointed, qualified and acting Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, such appointments having been made by the County of Kenosha County, State of Wisconsin, on May 3, 1945. A certified copy of the record of each appointment is filed herewith. Plaintiff further says that Charles Durkee and Caroline Durkee were residents of Kenosha County, State of Wisconsin, at the time of their

deaths, which occurred on January 14, 1870 and February 22, 1911, respectively. Plaintiff further represents to the Court that both decedents left Last Wills and Testaments, which were duly admitted to probate by the Kenosha County Court in Probate in and by the County of Kenosha, State of Wisconsin.

2. Plaintiff further respectfully represents to this Court that the said Charles Durkee, deceased, during his lifetime became the owner of certain Paramount Lien Bonds issued pursuant to Acts of Congress dated July 1, 1862 and as amended by Congress by an Act on July 2, 1864. Said Acts of Congress were for the purpose of encouraging the construction of railroads in the United States, and at the time of the death of Charles Durkee, he owned bonds issued under the foregoing Acts, under the terms of which the following railroads were interested parties:

Union Pacific
Central Pacific
Denver Pacific
Kansas Pacific
Central Branch U. P.
Sioux City.

Plaintiff further represents to the Court that the said Charles Durkee, owned bonds in the above railroads, by virtue of cash purchases, construction contracts, sale of supplies and professional services rendered to said railroad companies.

3. Plaintiff respectfully represents to this Court that by Acts of Congress dated May 7, 1878 and March 3, 1887, the several railroads involved deposited funds into a sinking fund for the purpose of retiring said bonds referred to herein. Plaintiff further represents that the matured value of the Paramount Lien Bonds as of 1900 was $187,500,000.00

4. Plaintiff further respectfully represents to this Court that by the terms of the Last Wills and Testaments of

Charles Durkee and Caroline Durkee, deceased, the said Racine College of Racine, Wisconsin, is the residuary beneficiary. It is plaintiff's information and belief that funds in excess of the $187,500,000.00 have been paid into the sinking fund and are presently carried as trust assets in the records and files of the United States Treasury Department.

5. Plaintiff further respectfully represents to this Court that no part of said sum of $187,500,000.00 has been paid to the plaintiff. Plaintiff and the principal parties in interest herein, namely: Racine College of Racine, Wisconsin, has at all times borne true allegiance to the Government of the United States and has not in any way or by any act encouraged any adverse interests against the said Government. Plaintiff represents that the said residuary beneficiary, namely: Racine College is justly entitled to the amount claimed herein from the United States.

WHEREFORE, plaintiff prays judgment against the United States in the sum of One Hundred Eighty-seven Million Five Hundred Thousand and no/100 ($187,500,000.00) Dollars and for such further relief as to this Honorable Court may seem proper in the premises.

HOWARD T. FOULKES
Howard T. Foulkes, as Administrator De Bonis Non Cum Testamento Annexo of the Estates of Charles Durkee and Caroline Durkee, deceased, and Secretary-Treasurer, Board of Trustees of Racine College.

CITY OF MILWAUKEE
STATE OF WISCONSIN } ss:

HOWARD T. FOULKES, being duly sworn, deposes and says that he is the plaintiff and that as such he is authorized to verify the foregoing petition; that he has read the said petition and knows the contents thereof; and that the state-